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Central District of California  
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**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

**LOS ANGELES DIVISION**

In re: ) Case No. 2:11-bk-15975-PC  
SCI REAL ESTATE INVESTMENTS, ) Adversary No. 2:13-ap-01175-PC  
LLC, a Virginia limited liability company, )  
SECURED CALIFORNIA )  
INVESTMENTS, INC., a California )  
corporation; )

**WILLIAM HOFFMAN, not individually }  
**MEMORANDUM DECISION****

Date: April 16, 2013  
Time: 9:30 a.m.  
Place: United States Bankruptcy Court  
Courtroom # 1468  
255 East Temple Street  
Los Angeles, CA 90012

This matter comes before the court on a motion by Defendants, Joel D. Adelman, et al., (collectively, the “Defendants”) seeking a dismissal of Plaintiff’s Complaint for: (1) Avoidance and Recovery of Actual Fraudulent Transfers [11 U.S.C. §§ 544(B), 550(A), 551 and California Uniform Fraudulent Transfer Act, Cal. Civ. Code Sections 3439.01 – 3439.12]; (2) Avoidance and Recovery of Constructive Fraudulent Transfers [11 U.S.C. §§ 544(B), 550(A), 551 and

California Uniform Fraudulent Transfer Act, Cal. Civ. Code Sections 3439.01 – 3439.12]; and (3) Second Omnibus Objection to and Disallowance of Claims Held by Defendants [See Attached Exhibit 1 for List of Defendants’ Proofs of Claim] [11 U.S.C. §§ 502(B)(1) and 502(D)] (“Complaint”) pursuant to F.R.Civ.P. 12(b)(6).<sup>1</sup> William Hoffman, Liquidating Trustee of the SCI Bankruptcy Liquidating Trust (“Hoffman”) opposes the motion. Appearances were stated on the record. The court, having considered the pleadings and arguments of counsel, makes the following findings of fact and conclusions of law pursuant to F.R.Civ.P. 52(a)(1), as incorporated into FRBP 7052 and applied to adversary proceedings in bankruptcy cases.

## I. STATEMENT OF FACTS

On February 11, 2011, SCI Real Estate Investments, LLC (“SCI LLC”) and Secured California Investments, Inc. (“SCI Inc.”) filed voluntary petitions under chapter 11 of the Code in Case Nos. 2:11-bk-15975-PC and 2:11-bk-15987-BR, respectively, in the United States Bankruptcy Court, Central District of California, Los Angeles Division. By order entered on March 4, 2011, the SCI Inc. case was reassigned to Judge Peter H. Carroll to be jointly administered with SCI LLC under Case No. 2:11-bk-15975-PC. On June 15, 2012, the court confirmed the First Amended Joint Chapter 11 Plan of Liquidation for SCI Real Estate Investments, LLC and Secured California Investments, Inc. dated April 19, 2012. Under the confirmed plan, Hoffman is authorized as the Liquidating Trustee to prosecute and settle all causes of action owned by the trust.

On February 15, 2013, Hoffman filed his four-count Complaint against the Defendants in this adversary proceeding. According to the Complaint, SCI Inc. and SCI LLC (collectively, the “Debtors”) operated approximately 60 limited liability companies engaged in the business of real

<sup>1</sup> Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). “Rule” references are to the Federal Rules of Bankruptcy Procedure (“FRBP”), which make applicable certain Federal Rules of Civil Procedure (“F.R.Civ.P.”). “LBR” references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California (“LBR”).

1 estate investment. Each of the Debtors' limited liability companies would acquire equity in one  
2 or more commercial real estate properties and offer co-ownership interests in those properties to  
3 individual investors. One of the Debtors' limited liability companies was SCI Ft. Myers Fund,  
4 LLC ("SCI Ft. Myers"). SCI Ft. Myers and Naples Realty Group, LLC formed Ft. Myers  
5 Property Investment Co. to acquire and operate three apartment communities in Ft. Myers,  
6 Florida. SCI Inc. owned an 8.8% interest in SCI Ft. Myers. Each of the Defendants invested  
7 with SCI Inc. in SCI Ft. Myers and, as an SCI Ft. Myers Fund Investor, received an SCI Ft.  
8 Myers Membership Interest. Defendants' initial investments in SCI Ft. Myers ranged from  
9 \$1,000 to \$1,021,000 each, according to Exhibit 1 to the Complaint.

10 When the Ft. Myers Property Investment Co. proved unprofitable, SCI Ft Myers sent a  
11 letter to each of the Defendants offering to acquire their respective SCI Ft. Myers Membership  
12 Interests. By Assignment Agreement dated November 1, 2008, the Defendants each transferred  
13 their respective SCI Ft. Myers Membership Interests to SCI Inc. and released SCI Inc. and its  
14 affiliates from any liability arising out of SCI Ft. Myers in exchange for SCI Inc.'s promise  
15 evidenced by a promissory note ("Ft. Myers Note") to reimburse each Defendant for the Initial  
16 Investment, less any amounts already received. Hoffman alleges that the Debtors were insolvent  
17 at the time of this transfer, and thereafter, did not make any payments on the Ft Myers Notes  
18 given to the Defendants in conjunction with the transfer. Hoffman objects to the Defendants'  
19 respective proofs of claim and seeks to avoid and recover the transfers pursuant to § 544(b) as  
20 either actually or constructively fraudulent under state law.

21 On March 21, 2013, Defendants filed their Motion to Dismiss seeking a dismissal of  
22 Hoffman's Complaint with prejudice pursuant to F.R.Civ.P 12(b)(6) on the following grounds:

23 First, the Complaint fails to describe any "fraudulent scheme" of the  
24 Debtors, let alone with the particularity that is required for allegations of fraud.  
25 Second, the fraudulent conveyance allegations are premised on the unsupportable  
26 allegation that the SCI Ft. Myers Membership Interests were "worthless" or "had  
27 negligible value". . . , even though, at no point, does the Complaint assert the  
28 value of the underlying Portfolio Properties. Third, based on the assumption that  
the SCI Ft. Myers Membership Interests had little value, the Complaint  
summarily concludes that the Ft. Myers Notes given in exchange for the SCI Ft.  
Myers Membership Interests (and the Defendants' Releases) were not of "a

1 reasonably equivalent value," without any factual basis to make such claim  
2 "plausible." Finally, the Complaint does not contain any factual allegation to  
3 support the conclusion that the Debtors were insolvent at the time of, or were  
4 made insolvent by, the SCI Ft. Myers Membership Interest Transfer – which was  
27 months before the Petition Date.<sup>2</sup>

5 On April 2, 2013, Hoffman filed opposition to Defendants' Motion and Defendants replied on  
6 April 9, 2013. After a hearing on April 16, 2013, the court took the matter under submission.<sup>3</sup>

7 **II. DISCUSSION**

8 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§  
9 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (H) &  
10 (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a).

11 **A. Standard for Dismissal Under Rule 12(b)(6)**

12 Rule 12(b)(6) authorizes the court, upon motion of the defendant, to dismiss a complaint  
13 for failure to state a claim upon which relief can be granted.<sup>4</sup> F.R.Civ.P. 12(b)(6). Under Rule  
14 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader  
15 is entitled to relief."<sup>5</sup> F.R.Civ.P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not  
16 require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-  
17 unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell

18 <sup>2</sup> Motion to Dismiss ("Defendants' Motion") 6:21 to 7:8.

19 <sup>3</sup> At the conclusion of oral argument, the court advised counsel for the parties of its  
20 intention to grant Defendants' motion and dismiss Hoffman's Complaint with leave to amend.  
21 The court notes that Defendants "do not consent to entry of final orders or judgment by the  
22 bankruptcy judge in this adversary proceeding." Defendants' Motion 1:18-21. Absent consent  
23 or waiver, this court lacks constitutional authority to enter a final judgment on a fraudulent  
24 transfer claim against a person or entity that has not filed a proof of claim against the bankruptcy  
estate. See Executive Benefits Ins. Agency v. Arkison (In re Bellingham Ins. Agency, Inc.), 702  
F.3d 553, 565 (9th Cir. 2012). Dismissal with leave to amend, however, does not implicate Stern  
v. Marshall because it does not end the litigation on the merits. See Goodman v. H.I.G. Capital,  
LLC (In re Gulf Fleet Holdings, Inc.), 2013 WL 1342751 (Bankr. W.D. La. 2013).

25 <sup>4</sup> Rule 12(b)(6) is applicable to adversary proceedings by virtue of FRBP 7012(b).

26 <sup>5</sup> Rule 8(a) is applicable to adversary proceedings by virtue of FRBP 7008(a).

1 Atlantic Corp. v. Twombly, 550 U.S. 554, 555 (2007)). “[A] complaint must contain sufficient  
2 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal,  
3 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). “A claim has facial plausibility when the  
4 plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
5 defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678 (quoting Twombly, 550  
6 U.S. at 556). “[A] complaint [that] pleads facts that are ‘merely consistent with’ a defendant’s  
7 liability . . . ‘stops short of the line between possibility and plausibility of entitlement to relief.’”  
8 Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). Further, although a court must  
9 accept as true all factual allegations contained in a complaint, a court need not accept plaintiff’s  
10 legal conclusions as true. Iqbal, 556 U.S. at 678. “Threadbare recitals of the elements of a cause  
11 of action, supported by mere conclusory statements, do not suffice.” Id. (quoting Twombly, 550  
12 U.S. at 555).

13 In the bankruptcy context, Twombly means that a plaintiff can no longer simply recite the  
14 statutory language of the particular Code section under which a claim is brought and expect the  
15 complaint to give sufficient notice to a defendant of the plaintiff’s claim for relief. To pass  
16 muster under Twombly, a plaintiff must state a plausible claim for relief by identifying the  
17 specific facts upon which the plaintiff relies to support a finding on each element of the  
18 plaintiff’s claim. Only then will a defendant have sufficient notice of plaintiff’s claim under  
19 Rule 8(a). See, e.g., Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) (“the non-  
20 conclusory ‘factual content,’ and reasonable inferences from that content . . . [must] plausibly  
21 [suggest] a claim entitling the plaintiff to relief.”); Limestone Dev. Corp. v. Vill. of Lemont, Ill.,  
22 520 F.3d 797, 802-03 (7th Cir. 2008) (stating that Twombly “teaches that a defendant should not  
23 be forced to undergo costly discovery unless the complaint contains enough detail, factual or  
24 argumentative, to indicate that the plaintiff has a substantial case”).

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1 B. Hoffman's Complaint Fails to State a Plausible Claim for Avoidance and Recovery of an  
2 Actual Fraudulent Transfer

3 Rule 9(b) states that, “[i]n alleging fraud or mistake, a party must state with particularity  
4 the circumstances constituting fraud or mistake.” F.R.Civ.P. 9(b). Rule 9(b)’s heightened  
5 pleading standard applies to allegations of fraud and allegations sounding in fraud, including  
6 false misrepresentations. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106-07 (9th Cir.  
7 2003); Neilson v. Union Bank of Cal., N.A., 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003).  
8 Allegations under Rule 9(b) must be stated with “specificity including an account of the time,  
9 place, and specific content of the false representations as well as the identities of the parties to  
10 the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). “To comply  
11 with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the  
12 particular misconduct which is alleged to constitute the fraud charged so that they can defend  
13 against the charge and not just deny that they have done anything wrong.” Bly-Magee v.  
14 California, 236 F.3d 1014, 1019 (9th Cir. 2001) (citations/ internal quotations omitted).  
15 Moreover, where a plaintiff pleads allegations of fraud against more than one defendant, Rule  
16 9(b) “requires that a plaintiff plead with sufficient particularity attribution of the alleged  
17 misrepresentations or omissions to each defendant.” In re Silicon Graphics, Inc. Sec. Litig., 970  
18 F.Supp. 746, 752 (N.D. Cal. 1997).

19 To state a claim for fraud, the plaintiff must also plead knowledge of falsity, or scienter.  
20 See In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1546 (9th Cir. 1994) (en banc). The  
21 requirement for pleading scienter is less rigorous than that which applies to allegations regarding  
22 the “circumstances that constitute fraud” because Rule 9(b) states that “[m]alice, intent,  
23 knowledge, and other conditions of a person’s mind may be alleged generally.” F.R.Civ.P. 9(b).  
24 However, the plaintiff must “set forth facts from which an inference of scienter could be drawn.”  
25 Cooper v. Pickett, 137 F.3d 616, 628 (9th Cir. 1997) (quoting GlenFed, 42 F.3d at 1546).

26 Under California law, a transfer made with the actual intent to hinder, delay or defraud  
27 any creditor of the debtor violates California’s Uniform Fraudulent Transfer Act (“UFTA”). Cal.  
28

1 Civ. Code § 3439.04; see Mejia v. Reed, 31 Cal.4th 657, 664 (2003). To prevail under  
2 California's UFTA § 3439.04(a)(1), Hoffman must establish by a preponderance of the evidence  
3 that the Debtors transferred the Ft. Myers Notes and releases in exchange for the SCI Ft. Myers  
4 Membership Interests with the actual intent to hinder, delay or defraud a creditor. See  
5 Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 235 (9th Cir. BAP 2007) ("Whether there is  
6 actual intent to hinder, delay, or defraud under UFTA is a question of fact to be determined by a  
7 preponderance of evidence."). Because a debtor rarely admits to such a transfer, the evidence of  
8 intent "must of necessity consist of inferences drawn from the circumstances surrounding the  
9 transaction and the relationship and interests of the parties." Neumeyer v. Crown Funding Corp.,  
10 56 Cal.App.3d 178, 183 (1976); see Beverly, 374 B.R. at 235 ("Since direct evidence of intent to  
11 hinder, delay or defraud is uncommon, the determination typically is made inferentially from  
12 circumstances consistent with the requisite intent."). The UFTA identifies 11 non-exclusive  
13 factors, or "badges of fraud," that may be applied by a court to divine fraudulent intent:

- 14 1. Whether the transfer or obligation was to an insider.
- 15 2. Whether the debtor retained possession or control of the property after the  
16 transfer.
- 17 3. Whether the transfer or obligation was disclosed or concealed.
- 18 4. Whether the debtor was sued or threatened with suit before the transfer  
19 was made or obligation incurred.
- 20 5. Whether the transfer was of substantially all of the debtor's assets.
- 21 6. Whether the debtor absconded.
- 22 7. Whether the debtor removed or concealed assets.
- 23 8. Whether the value of the consideration received by the debtor was  
24 reasonably equivalent to the value of the asset transferred or obligation incurred.
- 25 9. Whether the debtor was insolvent or became insolvent shortly after the  
26 transfer was made or obligation incurred.

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2 10. Whether the transfer occurred shortly before or shortly after a substantial  
3 debt was incurred.

4 11. Whether the debtor transferred essential assets of the business to a  
5 lienholder who then transferred the assets to an insider of the debtor.

6 Cal. Civ. Code § 3439.04(b). The UFTA factors are intended “to provide guidance to the trial  
7 court, not compel a finding one way or another.” Filip v. Bucurenciu, 129 Cal.App.4th 825, 834  
8 (2005). As the court observed in Beverly:

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10 The UFTA list of “badges of fraud” provides neither a counting rule nor a  
11 mathematical formula. No minimum number of factors tips the scales toward  
12 actual intent. A trier of fact is entitled to find actual intent based on the evidence  
13 in the case, even if no “badges of fraud” are present. Conversely, specific  
14 evidence may negate an inference of fraud notwithstanding the presence of a  
15 number of “badges of fraud.”

16 374 B.R. at 236.

17 In this case, Hoffman’s Complaint describes SCI Inc.’s acquisition of each of the  
18 Defendants’ SCI Ft. Myers Membership Interests in exchange for a Ft. Myers Note and a release.  
19 Hoffman’s Complaint identifies the date of the transfer and alleges that the transfer “was in  
20 connection with, and in furtherance of, the Debtors’ on-going fraudulent scheme.”<sup>6</sup> According to  
21 Hoffman, “the Debtors needed to appease their most prized investors, and did so, by acquiring  
22 Defendants’ worthless SCI Ft. Myers Membership Interests in exchange for the Ft. Myers Notes  
23 – in order to ensure that the Defendants would continue to invest in SCI TIC Real Estate  
24 Investments.”<sup>7</sup> Hoffman’s Complaint does not, however, sufficiently allege facts that would  
25 form the basis for a finding that the exchange itself hindered, delayed or defrauded a creditor of  
26 the Debtors or that the Debtors intended the exchange to do so on the date of the transfer.

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<sup>6</sup> Complaint 13:13-14; 13:15-16.

<sup>7</sup> Id. 13:16-19.

1       In paragraph 63 of the Complaint, Hoffman alleges three “badges of fraud” from which  
2 the court is asked to divine the requisite actual intent.<sup>8</sup> However, the allegations in Hoffman’s  
3 Complaint “set forth [few] facts from which an inference of scienter [can] be drawn.” See  
4 Cooper, 137 F.3d at 628. Each of the allegations in paragraph 63 is a legal conclusion “which  
5 may not [be] substitute[d] for well-pleaded facts allowing the Court to reasonably infer that those  
6 conclusions are true.” Allstate Ins. Co. v. Countrywide Fin. Corp., 842 F.Supp.2d 1216, 1226  
7 (C.D. Cal.2012).

8       Absent the following facts, Hoffman’s Complaint fails to state a plausible claim to  
9 recover an actual fraudulent transfer under § 544(b) and Cal. Civ. Code § 3439.04(a)(1):

- 10      1) The value of the SCI Ft. Myers Membership Interest conveyed by each Defendant to  
11 SCI Inc. on the date of the transfer, together with facts forming the basis for such  
12 valuation;
- 13      2) The value of the Ft. Myers Note and release conveyed to each Defendant by SCI Inc.  
14 on the date of the transfer, together with facts forming the basis for such valuation;
- 15      3) Facts that form the basis for Hoffman’s assertion that “the Debtors were insolvent as  
16 of December 31, 2007.”<sup>9</sup> [A debtor is insolvent when “the sum of such entity’s debts  
17 is greater than all of such entity’s property, at fair valuation.” 11 U.S.C. §  
18 101(32)(A)].
- 19      4) Facts that form the basis for Hoffman’s assertion that “[t]he Defendants knew that the  
20 value of the consideration received by the Debtors in exchange for the Ft. Myers  
21 Notes was not of a reasonably equivalent value.”<sup>10</sup>
- 22      5) Facts that form the basis for Hoffman’s assertion that “the Debtors were (i) insolvent  
23 when the Actual Fraudulent Transfers were made to the Defendants, or became  
24 insolvent as a result of the Actual Fraudulent Transfers made to the Defendants; or  
25 (ii) engaged in business or a transaction, or were about to engage in a business or a  
26 transaction, for which the property remaining with the Debtors after the Actual  
27 Fraudulent Transfers were made constituted unreasonably small capital; or, in the  
28 alternative, (iii) at the time the Actual Fraudulent Transfers were made, the Debtors

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<sup>8</sup> Id. 14:24 – 15:4.

<sup>9</sup> Id. 12:14-15.

<sup>10</sup> Id. 14:19-20.

1 intended to incur, or believed they would incur, debts that would be beyond the  
2 Debtors' ability to pay as they matured.”<sup>11</sup>

3 For these reasons, Hoffman's first cause of action to avoid and recover actual fraudulent  
4 transfers must be dismissed for failure to state a claim upon which relief can be granted.

5 C. Hoffman's Complaint Fails to State a Plausible Claim for Avoidance and Recovery of a  
6 Constructively Fraudulent Transfer

7 Courts do not generally apply the heightened pleading standard of Rule 9(b) to  
8 constructive fraud claims. The 1849 Condominiums Assoc., Inc. v. Bruner, 2010 WL 2557711  
9 (E.D. Cal. 2010), citing Cendant Corp. v. Shelton, 474 F.Supp.2d 377, 380 (D. Conn. 2007).  
10 Rule 9(b) is inapplicable because constructive fraud claims “are not based on actual fraud but  
11 instead rely on the debtor's financial condition and the sufficiency of the consideration provided  
12 by the transferee.” In re Careamerica, Inc., 409 B.R. 737, 755-56 (Bankr. E.D.N.C. 2009). Still,  
13 a constructive fraud claim must satisfy Rule 8(a) and contain sufficient facts to establish that the  
14 claim is plausible.

15 Under California law, constructive fraud may be found as to any present or future  
16 creditor when a debtor does not receive a reasonably equivalent value in exchange for a transfer,  
17 and either

18 (A) [w]as engaged or was about to engage in a business or a transaction for which  
19 the remaining assets of the debtor were unreasonably small in relation to the  
business or transaction, [or]

20 (B) Intended to incur, or believed or reasonably should have believed that he or  
21 she would incur, debts beyond his or her ability to pay as they became due.

22 Cal. Civ. Code § 3439.04(a)(2). Similarly, constructive fraud can be found under Cal. Civ. Code  
23 § 3439.05, “as to an existing creditor if the debtor does not receive reasonably equivalent value  
24 and ‘was insolvent at that time or ... became insolvent as a result of the transfer’” Mejia v. Reed,  
25 31 Cal.4th at 670, quoting Cal Civ. Code § 3439.05.

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<sup>11</sup> Id. 14:24 – 15:4.  
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1       Here, Hoffman's constructive fraud claims are insufficiently stated and must be  
2 dismissed. At its core, "a constructive fraudulent transfer has two elements: reasonable  
3 equivalent value and insolvency." Allstate Ins. Co., 842 F.Supp.2d at 1224. As previously  
4 stated, Hoffman's Complaint does not state sufficient facts to plausibly show that on the date of  
5 the transfer the Debtors were actually insolvent or received less than was given to the  
6 Defendants. Absent the following facts, Hoffman's Complaint fails to state a plausible claim to  
7 recover a constructive fraudulent transfer under § 544(b) and Cal. Civ. Code § 3439.04(a)(2) or §  
8 3439.05:

- 9       1. The value of the SCI Ft. Myers Membership Interest conveyed by each  
10      Defendant to SCI Inc. on the date of the transfer, together with facts forming  
      the basis for such valuation;
- 11      2. The value of the Ft. Myers Note and release conveyed to each Defendant by  
12      SCI Inc. on the date of the transfer, together with facts forming the basis for  
      such valuation;
- 13      3. Facts that form the basis for Hoffman's assertion that "the Debtors were  
14      actually insolvent at the time the Constructive Fraudulent Transfers were  
      made to each of the Defendants."<sup>12</sup>
- 15      4. Facts that form the basis for Hoffman's assertion that "the Debtors were (i)  
16      insolvent when the Constructive Fraudulent Transfers were made to the  
17      Defendants, or became insolvent as a result of the Constructive Fraudulent  
18      Transfers made to the Defendants; or (ii) engaged in business or a transaction,  
19      or were about to engage in a business or a transaction, for which the property  
20      remaining with the Debtors after the Constructive Fraudulent Transfers were  
21      made constituted unreasonably small capital; or, in the alternative, (iii) at the  
22      time the Constructive Fraudulent Transfers were made, the Debtors intended  
      to incur, or believed they would incur, debts that would be beyond the  
      Debtors' ability to pay as they matured."<sup>13</sup>

23      For these reasons, Hoffman's second cause of action to avoid and recover constructive fraudulent  
24      transfers must be dismissed for failure to state a claim upon which relief can be granted.

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26      <sup>12</sup> Id. 16:23-24.

27      <sup>13</sup> Id. 16:25 – 17:5.

1 D. Hoffman's Complaint Fails to State a Plausible Claim for Disallowance of Defendants'  
2 Proofs of Claim Pursuant to 11 U.S.C. § 502(d) or 11 U.S.C. § 502(b)(1)

3 Having failed to sufficiently plead the actual fraudulent transfer claims and constructive  
4 fraudulent transfer claims, Hoffman's third and fourth causes of action must be dismissed.

5 E. Leave to Amend

6 Rule 15(a)(2) of the Federal Rules of Civil Procedure states that “[t]he court should freely  
7 give leave [to amend] when justice so requires.” F.R.Civ.P. 15(a)(2).<sup>14</sup> If a complaint lacks  
8 facial plausibility, a court must grant leave to amend unless it is clear that the complaint's  
9 deficiencies cannot be cured by amendment. Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th  
10 Cir. 2002). It is not clear to the court at this juncture whether the deficiencies in Hoffman's  
11 Complaint cannot be cured by amendment.

12 CONCLUSION

13 As Hoffman fails to state a claim upon which relief can be granted with respect to each of  
14 the counts in the Complaint, Defendants' motion to dismiss under F.R.Civ.P. 12(b)(6) will be  
15 granted with leave to amend. Hoffman shall file and serve Plaintiff's First Amended Complaint  
16 not later than June 3, 2013, to cure the deficiencies identified above and to state a plausible claim  
17 for relief on each of his four causes of action. Defendants must file and serve a response to  
18 Hoffman's First Amended Complaint not later than June 28, 2013.

19 A separate order will be entered consistent with this opinion.

20 ####

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22  
23 Date: May 1, 2013



24 \_\_\_\_\_  
25 Peter H. Carroll  
26 United States Bankruptcy Judge

27  
28 <sup>14</sup> Rule 15(a)(2) is applicable to adversary proceedings by virtue of FRBP 7015.

## **NOTICE OF ENTERED ORDER AND SERVICE LIST**

Notice is given by the court that a judgment or order entitled (*specify*): Memorandum Decision was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner stated below:

**1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** – Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of (date) 05-1-2013 , the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

- Kay S Kress kressk@pepperlaw.com, alexsym@pepperlaw.com
- Christine M Pajak cpajak@stutman.com
- Penelope Parmes pparmes@rutan.com
- United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

on attached page

2. **SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

on attached page